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No. 00-211

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CHARLES L. GRIMES and JANE GILLESPIE GRIMES,
Petitioners,

v.

NORTHWEST AIRLINES, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. Correction of an Erroneous Representation of Fact in Respondent's Brief.

At the outset, we are constrained to correct certain categorically incorrect statements in respondent's brief.

Respondent says that petitioner Grimes "was sitting in the wrong seat," Brief for Respondent ("Resp. Br."), "Questions Presented," p. i; that he "took a seat in the exit row which was not assigned to him." *Id.* at 3.

Respondent cites no record source for these statements and they are not true. The record is clear that Grimes was sitting in the seat for which he held a valid and confirmed ticket and boarding pass. Leone himself testified that Grimes had been assigned that seat, that he held that boarding pass when he took the

seat, and that he had no way of knowing otherwise before Leone confronted him on the plane after he had taken the seat for which he held a boarding pass. APP1428-1431, APP1434. The boarding pass itself is in the record below at APP0137-38. Respondent, through incompetence or callous indifference, may well have subsequently given another passenger a boarding pass marked for the same seat as well, without informing Grimes, but there is no question but that Grimes was sitting in the seat assigned to him and which he had made special efforts to obtain.

Presumably this erroneous representation of the facts is thought to support respondent's otherwise puzzling characterization of *Asher* v. *United Airlines*, 70 F. Supp. 2d 614 (D. Md. 1999) (passenger sitting in business class with only a coach class ticket) as a "mirror image" of this case. Resp. Br. at 14.[1]

II. Respondent's Brief Is Directed at Issues That Are Not Presented.

1. The Petition makes two points. The first is that the *method* of analysis applied to the facts by the court below in purported compliance with *Air France* v. *Saks*,

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[1] Nor is any record citation offered for the proposition that Grimes referred to the over-200-pound Leone as a "dwarf," *id.* at 3, or the repeated innuendo that Grimes, whose behavior the very arresting officer described as "matter of fact," Petition at 5, presented some sort of risk of violence.

Such erroneous representations of fact have no bearing on the issue here, of course, except to point up the inappropriateness of summary judgment and the need to underscore this Court's admonition in *Air France* v. *Saks*, 470 U.S. 392, 405 (1985), that in Warsaw Convention cases "it is for the *trier of fact* to determine whether an 'accident' as here defined caused the passenger's injuries." (Emphasis added).

470 U.S. 392 (1985) — a loose sweeping *ipse dixit* that the broad class of event in issue is something "hardly unexpected or unusual" — is inconsistent with the Eleventh Circuit's interpretation in *Krys* v. *Lufthansa German Airlines*, 119 F.3d 1515, 1521-22 and n.10 (11th Cir. 1997), *cert. denied*, 522 U.S. 1111 (1998), that *Saks* requires specific analysis of the facts, "asking what precise event or events allegedly caused the damage sustained by the plaintiff"[2]; and with the characterization of the very approach followed by the court below as "questionable" by Justice Ginsburg, speaking for the Court, in *El Al Israel Airlines, Ltd.* v. *Tseng*, 119 S. Ct. 662, 670 n.9 (1999).

Respondent asserts, however, that petitioners' "argument depends on a factual analysis of the cases." Resp. Br. at 9. Not in the least. It addresses rather what *manner* of factual analysis a court should conduct — a question of law if there ever was one. And on this, the "questionable" methodology adopted by the court below stands in stark contrast to the careful methodology of other circuits, and warrants review by this Court.

2. Respondent's argument on the Petition's second point is directed at an issue that is simply not raised. Respondent incorrectly characterizes the question at issue as being whether Article 25 of the Warsaw Convention "creates a separate cause of action" for willful misconduct. Resp. Br. "Questions Presented," at i; *id.* at 11. Not so. The question is not whether Article 25 *creates* a separate cause of action, but whether it *negates the exclusion* of the cause of action *already*

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[2] *Accord*, *Wallace* v. *Korean Air*, 2000 WL 730385 (2d Cir. June 6, 2000).

created by domestic law, which would take place under Article 17 absent willful misconduct. This was the point succinctly made by Justice Stevens (dissenting as to a different question) in *El Al, supra*: Under Article 25, he pointed out, "[t]he Convention . . . does not preempt local law in cases arising out of 'willful misconduct,'" 119 S. Ct. at 676; "accident cases . . . preempt local law, [while] willful cases . . . do not." *Id.* at 677. As was pointed out in the Petition, the interpretation adopted by the court below flies in the face of the unambiguous words of the Convention and is justified only by a recourse to negotiating history that is impermissible under this Court's decisions. Petition at 13-14. Respondent's argument is directed at an irrelevant straw man.

Respectfully submitted,

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